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Supreme Court of the United States

October Term, 1960

No. 403

MORTON BORROW,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

VICTOR RABINOWITZ,
Attorney for Petitioner.

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Your petitioner, Morton Borrow, respectfully prays that this Court grant a rehearing of the order denying his petition for a writ of certiorari and that upon such rehearing the writ be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 30, 1960.

This petition for rehearing is requested for the following reasons:

1. There is at present widespread uncertainty as to the authority of the Federal Communications Commission to apply a political test to applicants for license. This uncertainty arises from the fact that the Commission's assertion of authority would seem to be in conflict with the principles of this Court's opinions in *Kent* v. *Dulles*, 357 U. S. 116, and *Green* v. *McElroy*, 360 U. S. 474. Both of those cases held, as we understand them, that statutory authority to permit political screening must be expressly granted by Congress and will not be implied from general

language. The Court's failure to grant certiorari in this case can only prolong the existing confusion.

Since the petition herein was filed, the *Cronan* case referred to at page 12 of our petition, has been argued in the Court of Appeals for the District of Columbia. It is anticipated that, if the ruling of the Commission in that case is affirmed, Cronan will likewise make an application for certiorari to this Court. The same may be true of the half-dozen others whose cases are pending before the Commission; indeed, we are advised that there are still many other applicants for licenses who may be confronted with similar action by the Commission in the near future, once this matter is determined. In justice to them, as well as to petitioner, their rights ought to be authoritatively stated by this Court.

2. In our original petition, we pointed out that this case had been widely regarded as a test case, not only by petitioner but by the Commission as well. Shortly before the filing of the petition herein, the House Committee on Un-American Activities conducted a hearing at which a member of the Commission and counsel for the Commission testified. The minutes of those proceedings have become available in the past few weeks, and an examination of them indicates that their object was to consider a bill offered by Congressman Walter amending the Communications Act of 1934, to authorize the Commission, *inter alia*, to take the very action under consideration in this proceeding. The very introduction of the bill, of course, indicates some question in the minds of its sponsors as to the authority of the Commission to make the order in this case.

During the course of the hearing there was extensive discussion by Congressman Walter, by Commissioner Robert E. Lee and by Edgar W. Holtz, Associate General Counsel of the Commission as to the powers of the Com

mission. Thus Congressman Walter, an astute lawyer and a man with much experience in this area, asked:

> "Where is the existing law, is there express authorization for you to ask the question you did in the Borrow case? I am going to give you a curbstone opinion, and it may or may not be worth anything, but we have seen on so many occasions the Court holding that unless it is spelled out specifically, it is nonexistent, on the theory that the Government has no authority, no implied authority, to protect itself. This is a new idea, but nonetheless that is the situation."

Mr. Holtz responded "• • • This, again, is the point which will be determined at the Supreme Court level." Mr. Holtz went on to say that the testimony given by Commissioner Lee at the hearing was intended to protect the position of the Commission "in litigation when it gets to the Supreme Court." (Hearings before the House Committee on Un-American Activities, House of Representatives, 86th Congress, 2nd Session, August 23, 1960, entitled "Communist Penetration of Radio Facilities", p. 1876.)

3. The issue in this case would appear to be closely analogous to issues presented in closely related fields in which the Court has not only granted writs but has ultimately held that the action taken by the administrative agency in question was in excess of statutory authority. As is noted above, this was the precise issue in the *Kent* and *Green* cases and hence a denial of a writ in this case seems quite inconsistent with this Court's policy over the past few years.

4. Furthermore, assuming statutory authority, there are constitutional issues here which have never been passed upon by the Court and which are analogous to issues presented in cases like *Shelton* v. *Tucker* now pending before this Court as No. 14 October Term 1960. We cannot see any significant difference, constitutionally speak

ing, between a requirement that an applicant for a license list all of the organizations to which he has ever belonged and a requirement that he list merely membership in the Communist Party or in the National Association for the Advancement of Colored People. The issue here differs only in irrelevant degree from cases such as *NAACP v. Alabama*, 357 U. S. 449 and *Bates* v. *City of Little Rock*, 361 U. S. 516.

5. Since the petition has been filed in this case there has been further indication of the importance of a Court decision in this matter. As a consequence of the hearings before the House Committee on Un-American Activities mentioned above, an employee of the National Broadcasting Company who testified in that case was discharged solely because he had refused to answer questions before the Committee. The matter has been submitted to arbitration, and so far as counsel knows it is still pending. Heavy reliance has been placed by the employer on the decision of the Court of Appeals in this matter. This is cited merely as an illustration of the consequences of the denial of a writ in this case.

December 8, 1960.

VICTOR RABINOWITZ,
Attorney for Petitioner.

Certificate Pursuant to Rule 58(a)

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds specified in Rule 58.

VICTOR RABINOWITZ,
Attorney for Petitioner.